

REPORT OF THE AD HOC INVESTIGATORY COMMITTEE ON FREEDOM OF SPEECH, ACADEMIC FREEDOM AND GOVERNANCE AT YORK UNIVERSITY

June 2008

Introduction

On 5 March 2005, the Executive of the Canadian Association of University Teachers unanimously passed the following motion:

That, at the request of the York University Faculty Association, the CAUT Executive set up a committee of inquiry to investigate issues respecting free speech and governance at York University.

In a letter to the President of YUFA, Arthur Hilliker, dated 10 March 2005, from Loretta Czernis, President of CAUT and James Turk, Executive Director of CAUT, announcing this decision, the specific terms of reference for the Committee were also set out:

1. To determine whether there were threats to, or breaches of right of free expression and academic freedom at York University;
2. To determine whether there were inappropriate governance practices;
3. To make any appropriate recommendations.

Subsequently an *ad hoc* investigatory committee was established and confirmed on 31 March 2005 and in May began the large task of fulfilling its very broad terms of reference.

Unlike most, if not all, other *ad hoc* investigatory committees, ours was not charged with examining a specific case involving one individual or event; rather, we were asked to examine large and complex domains—free expression, academic freedom and governance—within York University as a whole. This proved to be a daunting task for two volunteers receiving no respite from the other claims on their already more than full professional lives. Nonetheless, we conducted interviews with nearly three dozen faculty members and students, many lasting up to two hours or more, and, with selected individuals, on more than one occasion focusing on events that occurred primarily between 2003 and 2005. Included among those we interviewed were professors and students recommended to us by members of the executive of the York University Faculty Association (YUFA) as well as individuals who responded to an open call we sent to employee and student groups at York, as well as to the Y-File, York University's internal e-newsletter (although it should be noted that we cannot be certain how many of those groups publicized our call). We also received a number of written statements and collected or were provided with a great deal of relevant documentation for review. While on the York University campus to meet with colleagues, we visited Vari Hall to gain a sense of the space and its acoustics.

We do not claim that our study is exhaustive, but the evidence we considered is substantial and it does allow us to set out an informed assessment of the state of free expression, academic freedom and governance at York University. These three elements are interconnected in many, if not most, of the events we examined, a reality that made it difficult and, at times impossible to separate them out for discussion and we ultimately decided that such an approach created artificial boundaries that could not be sustained. In fact, we concluded that episodes related to free expression, academic freedom and governance are the obvious manifestations of a much larger effort to re-structure and re-direct the university, and this, in turn, is part of greater struggles around social and economic transformations which grip Canada and, indeed, the world.

Because of the nature of our work and the emphasis we were asked to place on York University as a whole, we do not examine any specific event in the kind of detail normally evident in the reports of *ad hoc* investigatory committees or committees of inquiry which typically deal with the experiences individuals have with employment, tenure or promotion decisions. Rather we take a broader, more sweeping view of events at York University over a number of years to explore whether there are consistent patterns of abuse to freedom of speech, academic freedom and collegial governance that warrant further attention from the CAUT.

It must also be said that three difficulties arose during the course of our work and hampered our efforts. First of all, many of the incidents and cases drawn to our attention have been or are being considered elsewhere, whether through the grievance processes outlined in the collective agreement made between the York University Faculty Association and the York University Board of Governors or through the courts. While this reality certainly suggests a campus troubled by difficulties in the areas we reviewed, it has complicated or negated our ability to comment on several matters.

Secondly, we received evidence from two untenured members of faculty, in two separate units, that substantively addressed matters of academic freedom and governance. While the professors wished to share the details of their experiences to expand on our understanding of the climate at York, they did not feel safe enough to allow us to use the information they provided. In fact, they feared that if they were identified, reprisals would follow and they might even be denied tenure. Although their cases are important and provide additional evidence supporting the conclusions we draw below, for ethical reasons we feel bound to honour these professors' requests to protect their identities and hence do not address the specific circumstances of their experiences because they would identify the individuals involved. We do mention these cases, however, because of our concern that for at least some members of the York community, the climate is one of fear. This points directly to questions about freedom of speech, the academic freedom of professors on campus and matters of management and governance. It also suggests that YUFA needs to play a more obvious and proactive role in the University and demonstrate more clearly that members can rely on their union for support.

Our work also was hampered by the refusal of the President of York University, Dr. Lorna Marsden, to meet with us. Three letters of invitation were sent to President Marsden (Coulter to Marsden, 1 May 2005; Coulter to Marsden, 23 June 2005; Coulter to Marsden, 25 October 2005) inviting her and other senior administrators to meet with the Committee and share their perspectives and any documentary materials pertinent to our investigation they might wish us to review. Each of our invitations was declined. In May 2005, President Marsden indicated that "We are committed to working first with YUFA to try to resolve the Association's concerns before giving consideration to participation in an external process" (Marsden to Coulter, 5 May 2005). On 11 July 2005, President Marsden responded to our second invitation by referencing a letter sent to CAUT President Loretta Czernis and Executive Director James Turk on 8 July 2005. This letter, written by the Counsel for York University, requested:

...that the Ad Hoc Investigatory Committee be dissolved or, in the alternative, stand down and suspend any investigatory activities in the face of and in preference to meaningful and good faith efforts at resolution of the issues between the University and YUFA. (Brooks to Czernis & Turk, 8 July 2005)

In November 2005, President Marsden indicated it was her view that "it would not be appropriate for me to meet with your Committee, and I repeat the University's previous requests that your Committee should stand down and take no further proceedings" (Marsden to Coulter, 7 November 2005). As a result, we were never able to meet with President Marsden or other senior administrators and so their views are not reflected in this report, except as they are revealed through their actions and written documentation such as Senate minutes, media releases and other public statements, reports and policies. The approach taken to our requests for meetings must also be seen as providing additional evidence about the nature of the governance process and management style at York University. Subsequent to completion of the first draft of the report, in the interests of fairness, Dr. Marsden was asked to comment on specific findings the Committee was considering making (Turk to Marsden, 31 March 2008, and Jacobsen to Brooks, 28 April 2008). She has responded through her counsel to say that she has now settled and entered into a confidentiality agreement with Freeman-Malloy which she says would make it inappropriate for her to comment (Brooks to Turk, 25 April 2008 and Brooks to Jacobsen, 5 May 2008).

The questions we address in this report are not new. In fact, they were given thoughtful consideration shortly after the founding of York University. In 1968, during a period of some turmoil on other university campuses in North America, President Murray Ross appointed a Presidential Committee on Rights and Responsibilities of Members of York University to consider what standards and norms should govern the behaviour of faculty and students. Chaired by The Honourable Mr. Justice Bora Laskin, a member of the Board of Governors, the Presidential Committee concluded that:

...the University is a community of faculty and students dedicated to the pursuit of truth and the advancement of knowledge and a place where there is freedom to teach, freedom to engage in research, freedom to create, freedom to learn, freedom to study, freedom to speak, freedom to associate, freedom to write and to publish. (Presidential Committee, 1970, p. 2)

In large measure the words, and certainly the substance of this statement, have made their way into the latest iteration of the Student Code of Conduct (York University, 2006, retrieved from www.yorku.ca/scdr).

At the same time, the Laskin Committee recognized that,

Like any community the University must continuously resolve the problem of liberty and order. But whatever be the approach in other communities, the University must in marginal cases show a preference for liberty, and risk its judgment in such cases for that preference. Only in a climate of openness of debate and discourse, of unhampered assembly and association, can the University community survive and adapt itself to a changing world. The exaltation of order at the expense of liberty would threaten the very foundations of the University. (Presidential Committee, 1970, p. 3)

Although written nearly four decades ago, these statements specify clearly what a university is understood to be and what that means in terms of the balance between freedom and responsibility. These basic principles of free speech and academic freedom continue to be reiterated in various forms in policies governing the actions of members of the York University community. The University's Mission Statement, for example, states, in part, that

We test the boundaries and structures of knowledge. We cultivate the critical intellect.we value tolerance and diversity. York University is open to the world: we explore global concerns.[we are] A community of faculty, students and staff committed to academic freedom, social justice, accessible education, and collegial self-governance...." (www.yorku.ca)

In important respects, this report evaluates the degree to which York University lives up to the promise of its mission statement.

The Precipitating Event: Vari Hall, 20 January 2005

The events leading directly to this investigation occurred on 20 January 2005, the day George W. Bush was inaugurated for a second term as President of the United States. The York University organization, Grassroots Anti-Imperialist Network (GRAIN), which is a working group of the Ontario Public Interest Research Group (PIRG), organized a demonstration in the Vari Hall Rotunda. The stated purpose of the demonstration was to provide students and others in the York community with an opportunity to speak out against the Bush administration and to make links between the business interests of some members of the York University Board of Governors and the corporations that benefited from the policies of the Bush government. Estimates about the size of the demonstration vary but there seem to have been somewhere between 30-50 demonstrators listening to speeches and about a hundred or more on-lookers. At some point about six officers from the Toronto Police Service, 31 Division, gathered in a location on the periphery of the Rotunda, joining members of the York University security service. According to President Marsden, the police officers "were on campus in anticipation that they might be required for assistance in dispersing the demonstrators" (York University, Minutes of Senate, 27 January 2005). There is some oral evidence to suggest that the police officers believed they had been called in to deal with members of the Ontario Coalition Against Poverty (OCAP), a community group with which the police had clashed before.

Reports vary as to whether or not York University Security Officers made repeated requests for the student demonstrators to disperse. There are also questions about the extent to which the police officers who were present also requested or ordered dispersal. Some reports suggest that it was only part-way into the demonstration that a police officer asked the students to disperse. Whatever the case, about 35-40 minutes into the demonstration the police officers who were present advanced on the group of demonstrators and proceeded to wrestle a number of them to the floor while students chanted, "Cops off campus." At least one faculty member, Professor Stanley Jeffers, reported that he observed police officers "pushing, shoving and grabbing some of the students" while one student was wrestled to the floor and "held down by two policemen while a third repeatedly and violently punched the prone student" (Jeffers to White, 22 January 2005). Video taken at the scene confirms this general description of events (see http://auto_sol.tao.ca/node/1126). During the melee, one police officer claimed that a student protester tried to unholster the officer's firearm and, in response to this, back-up was called and several police cars responded, effectively blocking off the Vari Hall Circle and thus impeding traffic at this point.

Several students were handcuffed and removed to a room that apparently had been previously booked in the Ross Building, a short distance from the Vari Hall Rotunda. Other students, concerned for the welfare of their peers, followed the police to the room and began knocking on

the door and yelling. Shortly thereafter the door was opened and one of those students was pulled into the room. According to those being detained in the room, the person who was pulled in was subjected to a beating by some of the police officers. He was later hospitalized for a short time. The students held in the room also report being forced to kneel and claim that they were subjected to a barrage of derogatory remarks that were homophobic and sexist. Five students were formally arrested at that time including the one who was accused of attempting to seize a police officer's firearm. It should be noted that in the following months, charges against these students were either dropped or dismissed and the student accused of trying to seize a police officer's weapon was found not guilty of the charge.

The administration of York University responded to the events at Vari Hall by issuing a media release confirming that five students had been arrested. The release went on to claim that:

For approximately 40 minutes the group carried on aggressively and disruptively. Consistent with York's policy of non-disruption of classes, the protestors were asked repeatedly by York security to cease these activities. They refused and classes had to be cancelled. Toronto police were then brought in to address the situation. The police peacefully and repeatedly asked the protestors to leave but some of the protestors became violent and at least one police officer was assaulted. (York University Media Release, 20 January 2005, retrieved from <http://www.yorku.ca/mediar/archive/Release.asp?Release=782>)

Another media release was issued the following day and it stated that "Violent acts were initiated by the protestors against the police." It went on to claim that "exams were disrupted and some classes held in Vari Hall had to be cancelled" (York University Media Release, 21 January 2005, retrieved from <http://www.yorku.ca/mediar/archive/Release.asp?Release=783> A subsequent statement by the University's Vice-President of Finance and Administration, Gary Brewer, stated that a policeman had been "hit in the head by a megaphone thrown by a protestor," that one protestor attempted "to remove a gun from a policeman's holster," and a policewoman was "assaulted by several protestors." His statement went on to claim that "Classes were cancelled and examinations were interrupted" and this affected 650 students and their professors (York University Media Release, 25 January 2005, retrieved from <http://www.yorku.ca/mediar/archive/Release.asp?Release=787>).

The substance of these claims was immediately challenged by various parties, as was the decision by the administration to invite police officers to attend on campus. On 22 January 2005, Professor Stanley Jeffers wrote to Nancy White in Media Relations indicating that he had inadvertently been an eyewitness to the events in Vari Hall and therefore knew that "Statements that have been included in media releases and which appear on the York web site to the effect that the students were violent or initiated violence are quite simply not true and should be corrected" (Jeffers to White, 22 January 2005). Professor Jeffers again repeated this request for correction on 26 January (Jeffers to White, 26 January 2005) but without effect. As has already been noted, video taken by students at the scene confirms Professor Jeffers' account that the police moved in on the students and thus initiated the physical confrontation. In fact, the high quality video retrieved from the University's own surveillance cameras located in Vari Hall and screened after a special meeting of Senate on 3 February 2005, also failed to confirm the administration claims about student initiated violence (Rahn, 2005).

Also we could not substantiate the claim made by President Marsden that "a faculty member came to complain that she had had to cancel her class" as well as the statement, "some classes

were disrupted and had to be cancelled due to noise" (Minutes of York University Senate, 27 January 2005). In response to these and other similar statements from the administration, YUFA circulated an e-mail asking its members who were teaching in Vari Hall on 20 January 2005 to indicate whether they had cancelled classes or had examinations disrupted. Of those responding to the query, approximately half of the professors teaching at the time, none indicated a cancellation of class or disruption of an examination. Anecdotal evidence provided as part of this survey overwhelmingly supports the conclusion that classes were not cancelled or even disturbed to any large degree (Were classes cancelled...? Retrieved from http://www.yufa.org/freespeech/Cancelled_classes.html).

Widespread concern was expressed about the use of police force on campus and its impact on freedom of expression. Jay Rahn, YUFA's Communications Officer, reported that he had received "many written accounts" from faculty members and that they were "unanimously critical of the administration's treatment [of] freedom of expression and its response to Thursday's anti-Bush demonstration" (Rahn to Editor, *Toronto Star*, 25 January 2005, retrieved from <http://www.yufa.org/freespeech/yufaresponds.html>). On 26 January 2005, the Canadian Union of Public Employees Local 3903 Executive, the YUFA Executive, the York Federation of Students Executive, and the York University Graduate Students' Association Executive issued a strongly-worded joint statement that said, in part,

As unions and associations representing students and workers at York and concerned with the level of repression of student activity and political assembly on campus, we were appalled by the York administration's response to this rally. As members of the York community we unequivocally condemn the York administration's response and the brutal treatment of our students by police and York security. We strongly support the right of students to organize on campus and to participate in political protest. Furthermore we wish to express our solidarity with those students who were arrested last Thursday. We demand that the York administration take no action against these students and that the charges laid against them by police be dropped. (Retrieved from <http://www.yufa.org/freespeech/jointstatement.html>)

Various departments and faculties within York University submitted statements or petitions condemning the Administration's actions, and a number of faculty associations and other organizations including the Ontario Confederation of University Faculty Associations, issued open letters criticizing the decision to use police to break up a political demonstration and the consequent implications for freedom of speech. A quickly organized demonstration for Vari Hall called to support the students and protest police action on campus as a threat to free speech was attended by at least 1,000 students, staff and faculty.

Considerable discussion about the events at Vari Hall seven days earlier occurred at the regular meeting of University Senate on 27 January 2005. In her statement to the Senate, President Marsden argued that there had been a pattern of class disruptions over several terms and reiterated the claim that classes were again being disrupted on 20 January, a claim we have already indicated does not appear sustainable. She further indicated that the administration had been aware that the GRAIN event was going to occur and was very concerned "[b]ecause the group in question has declared that it advocates both 'a confrontational attitude' and 'call to direct action and civil disobedience'." She went on to indicate that "one would expect people to disperse when asked to do so by uniformed TPS officers and we anticipated that the demonstrators would disperse when they were asked to do so." However, she asserted, "the protestors refused to move, physically protested and the next actions are now before the courts

and will be sorted out there. There can be no question that there was violent behaviour." Casting the decision of the administration to call the police to campus in anticipation of a confrontation as the means "to protect the main purposes of the University," Marsden stated,

The very purpose of our existence as a university is teaching and research. We do other things but that purpose is why we have students and why we have public support. The pursuit of teaching and research must take precedence over other interests and it does. It is absolutely fundamental to the exercise of our work that the academy be protected and I intend to continue to do so. (Marsden, 27 January 2005, Statement to Senate, York University Senate Minutes)

Few would dispute the view that the main purposes of a university are teaching and research but the question here is whether those purposes were in any way under threat, and by whom, during the events that occurred in Vari Hall on 20 January 2005. We can find no evidence to suggest that teaching and research purposes of York University were in any danger from a small group of students holding a protest in the rotunda of Vari Hall. In fact, it could be argued, and many would so do, that the students were engaged in a teaching and learning process about citizenship, social responsibility and the dangers of corporate-university linkages.

Most apparent is the danger to freedom of speech incurred by a decision to use police officers to break up the demonstration. The preamble to the CAUT *Policy Statement Concerning the Role of Public and Private Police Forces and Security Services on Canadian University and College Campuses* sets out the view that

the activities of policing agencies and security services on post-secondary institution campuses can threaten academic freedom. Experience shows that this belief is warranted. Such activities can interfere with the rights of individual members of the academic staff and students, and can undermine institutions' obligation to foster freedom of thought, expression and intellectual inquiry without restriction. (CAUT, 2006)

This is a view shared by the York University Senate which, on 27 January 2005, passed the following motion:

That Senate express its disapproval of the administration's decision to invite police onto campus to deal with an otherwise peaceful protest. (York University Senate Minutes, 27 January 2005)

At a special meeting of the Senate called for 3 February 2005 specifically to discuss the incident at Vari Hall, an additional motion about the police presence was passed. This motion read, "that the Chair write a letter on Senate's behalf to the Toronto Police Services Board to request an inquiry into the allegations of police brutality during the January 20 protest in Vari Hall" (York University Senate Minutes, 3 February 2005).

The special meeting also raised additional issues directly related to matters of free expression and open inquiry, namely the *Temporary Use of University Space Policy and Procedures* and the administration's use of communications strategies. A motion was made asking President Marsden "to negotiate new and workable temporary use of space provisions with Senate Executive, YUFA, the GSA, CUPE 3903, the YFS, and ORUs that will preserve both academic integrity and freedom of speech" but was subsequently withdrawn because the President agreed to establish a group to review the policy. A motion expressing "disapproval of the way

the President used the University's communications surrounding the January 20 events" was passed (York University Senate Minutes, 3 February 2005).

Taken together, these two motions highlight matters which are of grave concern to members of the York community, namely the arbitrary use of administrative policies and procedures to limit and control academic freedom and freedom of expression on campus and the use of communications strategies to "re-image" or "re-brand" and market York University. Both of these matters are closely linked to matters of governance and who decides what, how, when, and why. More fundamentally they speak to the very nature of what a university ought to be. We will return to this discussion shortly. We turn now, however, to another high profile case that further highlights concerns about freedom of speech and governance on the York University campus.

The Daniel Freeman-Maloy Case

Daniel Freeman-Maloy, an undergraduate student, transferred from the University of Toronto to York University in September 2003. He did so because, in his words, he

...was attracted to York University from the University of Toronto by the dynamism of York's social justice community, and this community's more rooted activists, and the foundations they have laid are the real basis for progressive politics at York – tumultuous or otherwise. (Freeman-Maloy, 2004, retrieved from http://www.en-camino.org/freespeechyorku/may9_2004freemanmaloy.html

In this choice, he mirrored the reasoning of other students and many faculty members we interviewed who elected to study or work at York because of its reputation as an institution supporting politically engaged work and social justice. Once at York, Freeman-Maloy became an involved activist while maintaining the marks necessary to remain enrolled in an Honours Political Science Program.

As part of his political activism, Freeman-Maloy is involved with Solidarity for Palestinian Human Rights (SPHR). SPHR is a student organization that originated in 1999 with the merger of the Concordia Centre for Palestinian Human Rights and the McGill Palestinian Solidarity Committee. Its mission statement states that:

SPHR is a non-profit, student-based organization that advocates on a strong social justice platform to uphold the rights of the Palestinian people in the face of human rights violations and all forms of racism, discrimination, misinformation and misrepresentation.

Through awareness raising, advocacy work, non-violent direct actions, solidarity building, and the promotion of Palestinian identity, culture and history, SPHR works to support and protect Palestinian human rights both locally and internationally. (SPHR, 2005, retrieved from <http://sphr.org>

Freeman-Maloy has also been engaged in supporting the efforts of the Ontario Coalition Against Poverty (OCAP) and has participated in a number of demonstrations for fair wages and working conditions with hotel workers outside their places of employment in downtown Toronto.

On 28 April 2004 a letter from the President of York University, Dr. Lorna Marsden, dated 21 April 2004 and post-marked 26 April 2004, arrived at Freeman-Maloy's Barrie address. In the letter, President Marsden informed Freeman-Maloy that he was barred from registering at the University and from attending the University's premises for three calendar years, effective 1 May 2004. He was further informed that if he were seen on the premises of the University, he would be issued a notice of trespass (Marsden to Maloy [sic], 21 April 2004).

The two specific offences that are cited in President Marsden's letter of expulsion are linked to Freeman-Maloy's work with SPHR and occurred on 22 October 2003 and 16 March 2004. The first of these was an SPHR counter-demonstration to an event called "Israeli Defence Forces (IDF) Appreciation Day" that was organized by the Young Zionist Partnership (Cohen, 2004, retrieved from http://www.eye.net/eye/issue/issue_05.13.04/city/york.html). The second occasion was an SPHR demonstration to mark the first anniversary of the death of an American peace activist, Rachel Corrie, who was killed by an Israeli bulldozer as she tried to block it from destroying a Palestinian home in the Gaza Strip. The first of these demonstrations was intended, by Freeman-Maloy's account, to confront the politics of the IDF and challenge an "event at which people sporting military paraphernalia congregated in one of York's principal public spaces to celebrate Israeli militarism" (Freeman-Maloy, 2004, retrieved from http://www.en-camino.org/freespeechyorku/may9_2004freemanmaloy.htm). The second demonstration, which involved about 30 students at a mock checkpoint, ended in a confrontation when about 150 counter-demonstrators rushed the SPHR display and the two opposing groups ultimately engaged in a loud fracas. By Freeman-Maloy's own account, he and many others "spoke and chanted through a megaphone" (Freeman-Maloy, 2004, retrieved from http://www.en-amino.org/freespeechyorku/may9_2004.freemanmaloy.html)

As a result of the confrontation at the second demonstration on 16 March 2004, both SPHR, the group that organized the demonstration, and Hillel, the group that mounted the counter demonstration, were suspended from any on-campus demonstrations for a week. This decision was protested by other students who saw the suspension as an intrusion on freedom of speech.

After the 22 October 2003 demonstration, Freeman-Maloy received a letter dated 12 November 2003 from Anne Marie Ridley of the University Complaint Centre in the Office of Student Affairs. The letter charged that Freeman-Maloy had used a sound amplification device without permission and ignored the requests of University officials to stop doing so. Referencing Presidential Regulation Number 2 – The Conduct of Students at York University, Ridley asked Freeman-Maloy to meet with her in order to respond to the concerns she outlined. Freeman-Maloy met with Ridley and at that meeting they agreed to meet again after they had, respectively, reviewed the Regulation and spoken with York Security. It was Freeman-Maloy's understanding that responsibility for setting up the next meeting rested with Ridley. Freeman-Maloy claims he heard nothing more from the York University administration until he received the letter of expulsion from President Marsden on 28 April 2004 (Marsden to Maloy [sic], 21 April 2004).

In that letter, Marsden cited Freeman-Maloy's attendance at the "unauthorized" demonstrations of 22 October 2003 and 16 March 2004 and the use of an "unauthorized sound amplification device" as grounds for the expulsion. She also contended that:

During the October and March demonstrations, you interfered with the proper functioning of University programmes and activities, contributed to the threat of harm to the safety and well-being of York University community members, and failed to abide by

reasonable instructions given orally and in writing by an official of the University authorized to secure compliance with regulations, rules, practices and procedures, all contrary to Presidential Regulation 2. (Marsden to Maloy [sic], 21 April 2004).

The response from the York University community to Freeman-Maloy's rustication was swift. On 19 May 2004 the YUFA Executive delivered a letter to President Marsden in which concern was expressed both with the process followed to discipline Freeman-Maloy and with the severity of the punishment. This letter gently points out that while President Marsden accuses Freeman-Maloy, among other things, of failing to comply with University regulations, policies and procedures, she, herself failed to follow the procedures outlined in Presidential Regulations 2 and 3 in dealing with the case. A similar point was made by the University Senate in the following motion passed on 27 May 2004.

That Senate respectfully requests that President Marsden do the following: Reconsider and rescind her decision on the suspension of Daniel Freeman-Maloy and in doing so permit him to attend on campus for the purpose of pursuing his studies and his employment; and ensures that all disciplinary action against students is taken within the context of established regulations, due process and with regard to the values of the University. (York University Senate Minutes, 27 May 2004).

The rationale that accompanied the motion noted:

This motion is based on numerous petitions, letters, and other communications which have expressed serious concern about the way that this case has been handled, especially the apparent lack of a fair and impartial hearing and appeal processes, the severity of the penalty, and the implications for freedom of expression on campus.

In their observations about process, and hence governance, YUFA and the Senate were correct. Presidential Regulation 2, which was in force at the time, outlined procedures for dealing with minor and serious infractions. Minor infractions were normally to be handled at the lowest level possible and through local mechanisms within colleges or Faculties, through local hearing officers, and with the use of mediative procedures, if necessary. Regulation 2 also noted that serious infractions, unless dealt with locally or by mediation, "shall be dealt with through the formal adjudicative procedures" and the Provost (not the President) was empowered to make a decision about further action. According to the Regulation, the Provost had several options. S/he could take no further action if a complaint was determined to be without merit; could decide the complaint was not serious and refer it to a local hearing officer; could institute mediation with the consent of all parties; could arrange for prosecution of the case before a Trial Panel of the University Discipline Tribunal, established by Presidential Regulation 3; or s/he could refer the whole matter to ordinary civil, criminal or other legal processes. Assuming the Provost took the same view of the seriousness of Freeman-Maloy's alleged infraction of standards of student conduct under Regulation 2, and that mediation or referring the matter to civil or criminal or other processes was not appropriate in the circumstances, the correct process would have been to convene a Trial Panel and follow the procedural guidelines outlined in the Regulation." The guidelines are in place, the Regulation states, "to ensure that its procedures are as fair as possible in the context of university circumstances and traditions" (Presidential Regulation 2, s.3, ss. b). To meet this standard the guidelines make provision for full disclosure of the evidence against the alleged offender, an open hearing set at a reasonable time and place, the right for all parties to be represented by

counsel or other advocate, to call evidence, make arguments, and cross-examine witnesses giving oral testimony. Following the conclusion of the hearing, the Trial Panel is expected to provide a written decision, specifying what sanctions (if any) are to be administered, and what procedures exist for appeal. The Regulation also specifies how an appeal of the decision may be made to an Appeal Panel of the University Discipline Tribunal whose ruling may be further appealed to the President whose decision will be final and binding.

By moving directly to expulsion, President Marsden acted in an arbitrary fashion and breached the procedures for due process and fairness outlined in Presidential Regulation 2. Her actions denied Daniel Freeman-Maloy, a 22 year-old undergraduate student, the opportunity to know the charges against him and to defend himself against those charges in an open hearing and with counsel, if he so desired. She brought to bear the full power of her office on a young student and, by expelling him for three years, issued a harsh punishment that, on the face of it, seems out of keeping with the nature of the offences he was alleged to have committed. Certainly, this was the position of 22 members of the Department of Political Science (Arts) where Freeman-Maloy was a student. They wrote to President Marsden urging her to rescind the expulsion and raising concerns about both the severity and differential nature of the punishment imposed, noting the implications of her actions for the principles of "academic and civil freedoms." In particular their letter stated:

We are equally troubled by the severity of the punishment inflicted, which seems to lack the sort of proportionality one expects of fair and judicious decisions. It would be one thing if it were alleged that Mr. Freeman-Maloy had committed acts of violence. But such is not the case. His ostensible 'crime' is to have expressed his views while using a megaphone.

The letter went on to argue that:

The University ought to pride itself on being a space for the free expression of dissenting opinions. To be sure, democracy is sometimes fractious. But this 'inconvenience' ought to be tolerated in the interest of preserving our rights to free expression and assembly.
(Albo et al. to Marsden, 9 June 2004)

As we have already indicated, these sentiments found wide expression on the York campus and elsewhere.

The CAUT itself raised questions and concerns about jurisdiction and process in letters dated 31 May 2004 (Turk to Marsden) and 2 July 2004 (Turk to Marsden). Of specific concern were matters related to the source of the President's extraordinary powers and President Marsden's unusual decision to discuss the case with the Board of Governors before making her decision to expel Freeman-Maloy. Since the expulsion of Freeman-Maloy also deprived Professor David Noble of the services of Freeman-Maloy as a research assistant and denied Freeman-Maloy the access to University libraries he required to fulfil the terms of his employment, the CAUT also asked for clarification of the procedures used to arrive at this decision and the source of the President's authority to deny Freeman-Maloy access to campus for employment purposes. It should also be noted that the expulsion also affected Freeman-Maloy's ability to meet the obligations of his position as an editor of *Excalibur*, the York University student newspaper.

Amidst the growing opposition to Marsden's decision, and two weeks after the Senate meeting of 27 May 2004, in a letter dated 10 June 2004, counsel for York University contacted counsel

for Freeman-Maloy, and indicated that President Marsden would appoint a panel to re-consider the penalty imposed on Freeman-Maloy if he agreed to sign a statement reading as follows:

I acknowledge that my conduct at York University during the academic year of 2003/04 fell below the standards expected of students at that University in a number of respects. Specifically, I realize that statements I made in respect of Henry Wu, a member of the Board of Directors of the York University Foundation, were personally threatening to him. The demonstrations which I organized and led were conducted in locations and in a manner which I knew was not permitted by the University's rules and unnecessarily disrupted academic activity and inflamed confrontations. I ignored the University's published rules and requests of University officials to alter my plans and behaviour, and to meet with them to discuss my behaviour after the fact. I understand that my behaviour constituted breaches of the Standards of Student Conduct set out in Presidential Regulation Number 2 and fell below the standards expected of York University students. I am sorry for the disruptions and the other adverse effects caused by my actions (Counsel for York University to Counsel for Daniel Freeman-Maloy, 10 June 2004).

It should also be noted here that the reference to Henry Wu relates to a speech given by Freeman-Maloy at a demonstration about wages and working conditions at a downtown hotel owned by Wu and at which a unionization drive was occurring. The introduction of this reference to Henry Wu and a demonstration that occurred many kilometres away from the York campus is enough to raise concerns about what was really driving the decision to discipline Freeman-Maloy and on what grounds the political activism and freedom of speech of a student off-campus were being policed by University officials.

Freeman-Maloy refused to sign the statement on the grounds that it contained many falsehoods and on 17 June 2004 commenced an action for a judicial review in the Ontario Divisional Court. On 2 July 2004, counsel for the University indicated to counsel for Freeman-Maloy, that the University had decided to convene a University Discipline Tribunal and hold a hearing using the procedures specified in Presidential Regulations 2 and 3. The University then attempted to have the application for judicial review quashed on the grounds that a disciplinary hearing for Freeman-Maloy had been set for 21 July 2004 and would provide a satisfactory alternate remedy. The hearing on the motion to quash the judicial review and the counter motion to stay the disciplinary hearing pending a decision on the judicial review occurred on 19 July 2004. In her decision issued on 20 July 2004, Madame Justice Epstein dismissed the motion to quash the judicial review and allowed the motion to stay the hearing of the discipline tribunal. She stated that the University's "alternate" remedy was not "adequate" and Freeman-Maloy would be "caught in a procedural nightmare." On 22 July 2004 the University informed Freeman-Maloy that President Marsden's punishment had been "vacated" and hence the three-year expulsion was rescinded. Both the discipline hearing and the application for a judicial review were abandoned. Freeman-Maloy pursued a case of misfeasance in public office against President Marsden and the Board of Governors and sought damages in the amount of \$850,000. The matter has now been settled out of court.

As part of that process, President Marsden claimed that she was not a public official and universities are not public institutions and hence cannot be sued for misfeasance. This position was upheld initially by a Superior Court ruling but a Court of Appeal over-turned that decision, ruling that the President occupies a statutory office and concluding that while "the President of York University is not subject to governmental control, she is in other respects subject to the